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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

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PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,
*Petitioners and Cross-Respondents,*

v.

ROBERT P. CASEY, *et al.*,
*Respondents and Cross-Petitioners.*

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**On Writs of Certiorari to the United States Court of Appeals for the Third Circuit**

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## BRIEF AMICUS CURIAE OF HON. HENRY J. HYDE, HON. CHRISTOPHER H. SMITH, HON. ALAN B. MOLLOHAN, HON. HAROLD L. VOLKMER, HON. ROBERT G. SMITH AND OTHER UNITED STATES SENATORS AND MEMBERS OF CONGRESS IN SUPPORT OF RESPONDENTS ‡

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## BRIEF AMICUS CURIAE OF HON. HENRY J. HYDE, HON. CHRISTOPHER H. SMITH, HON. ALAN B. MOLLOHAN, HON. HAROLD L. VOLKMER, HON. ROBERT G. SMITH AND OTHER UNITED STATES SENATORS AND MEMBERS OF CONGRESS IN SUPPORT OF RESPONDENTS

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### INTEREST OF THE AMICI

The *amici*, Members of Congress and Senators, have substantial interests in the disposition of this case. Congressional debates on legislation with provisions similar to the challenged sections of the Pennsylvania Abortion Control Act often center on the constitutionality of such requirements. *See, e.g.*, S323 102nd Cong., 1st Sess. Cong. Rec. S10113-21, S10124-25 (July 16, 1991) (parental notification required for minor who requests abortion). A decision from this Court upholding all of the challenged provisions and articulating a clear standard of review would resolve lingering doubts of constitutional infirmity that plague much abortion-related legislation and, therefore, would directly affect Congress' continued attempts to act in this area. More fundamentally, the decision of the court of appeals, abandoning the standard of review enunciated in *Roe v. Wade*, 410 U.. 113 (1973), draws into question the continuing viability of *Roe*, a question only this Court can answer definitively. Congress is keenly interested in the Court's answer as it holds the key to restoring the essential balance between legislative authority and judicial review under the federal Constitution.

### SUMMARY OF ARGUMENT

This Court's recent decisions have begun the process of dismantling "the mansion of constitutionalized abortion-law, constructed overnight in *Roe v. Wade*." *Webster v. Reproductive Health Services*, 492 U.S. 490, 537 (Scalia, J., concurring in part, concurring in the judgment). A majority of the Court has questioned or repudiated *Roe*'s trimester framework; has recognized com-

pelling state interests in maternal health and fetal life throughout pregnancy; and has employed a more relaxed standard of review in evaluating the constitutionality of abortion regulations. *Roe* is an impaired decision. Some lower federal courts have begun to recognize, and the country increasingly understands, that *Roe* has been limited. Overruling *Roe v. Wade* would not represent an abrupt about-face in the Court's abortion jurisprudence but rather would be the final step in a journey that began several years ago.

Stare decisis, a doctrine of diminished importance in the field of constitutional law, provides no basis for declining to overrule the multiple errors of *Roe v. Wade*. On 214 occasions this Court has overturned previous decisions. In nearly three-fourths of those cases, the Court overruled because the earlier decision had wrongly interpreted the Constitution.

The reasons for this self-correction—the difficulty of addressing constitutional error through amendment or legislation; the primacy of the text of the Constitution over the interpretations placed upon it; and the inappropriateness of the nation's highest tribunal perpetuating constitutional error—apply with special force to *Roe*. Moreover, the interests furthered by stare decisis are not served by retaining *Roe;* indeed, they are at cross-purposes. The doctrines of *Roe* have caused great instability and unpredictability in the law. Recent decisions of this Court exacerbate this uncertainty. Statements from the lower federal courts, as well as state and federal elected representatives, amply demonstrate the confusion resulting from attempts to read this Court's recent abortion decisions against the backdrop of *Roe v. Wade*.

Overruling *Roe* also would be consistent with past willingness to admit error. This Court has corrected decisions which, like *Roe*, have misinterpreted the "liberty" clause of the Fourteenth Amendment by placing an unwarranted strait-jacket on legislative authority.



And it has renounced the role of "super-legislature," sitting in judgment on the wisdom of state statutes. Doctrines on which long-standing social institutions and conventions were established have been overturned, as have doctrines on which scores of criminal convictions were predicated. The overturning of such decisions has often caused change, some of it disruptive. But in appropriate circumstances it also has returned to the political branches of government their rightful authority to respond to the pressing moral and social issues at the root of such change. *Roe*, contrary to this tradition, has usurped the legislative function, and has aggravated the social turmoil over abortion.

Finally, although this Court has shown a proper reluctance to overrule constitutional decisions where a less severe remedy is available, it is appropriate to overrule *Roe v. Wade* in this case. *Roe* is no longer viewed as stable or fully intact; this uncertainty concerning a decision so demonstrably unworkable and devoid of constitutional basis divests the decision of any rightful sway over the Court's decision here. *Roe* is constitutional error of the most radical variety, and the traditions of this Court call for such error to be dispatched without ambiguity or equivocation.

## ARGUMENT

### I. *ROE v. WADE* IS A WEAKENED DECISION WITH LIMITED PRECEDENTIAL VALUE, AT ODDS WITH RECENT DECISIONS OF THIS COURT, AND SHOULD BE EXPRESSLY OVERRULED.

Unlike the situation presented in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), where the Court was asked to overrule *Roe v. Wade*, 410 U.S. 113 (1973), only three years after its expansion and reaffirmation in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), this case presents the question three years after a plurality

of the Court expressly rejected central tenets of the *Roe* doctrine.[1] *Webster*, 492 U.S. 490 (1989).

*Webster* demonstrates that a majority of this Court finds *Roe*'s trimester framework "unworkable," "flawed," and "problematic." 492 U.S. at 518 (Rehnquist, C.J., joined by Kennedy, J., and White, J.); *id.* at 529 (O'Connor, J., concurring in part, concurring in the judgment); *see also*, *id.* at 532 (Scalia, J., concurring in part, concurring in the judgment). A majority also now treats the state's interest in unborn human life as compelling throughout pregnancy. *Id.* at 519 (Rehnquist, C.J., joined by Kennedy, J., and White, J.); *id.* at 529-30 (O'Connor, J., concurring in part, concurring in the judgment); *id.* at 532 (Scalia, J., concurring in part, concurring in judgment). And a majority has also rejected *Roe*'s generalized fundamental right to abortion and accordingly Roe's strict scrutiny standard of review. *Id.* at 518 n.15 (Rehnquist, C.J., joined by Kennedy, J., and White, J.); *id.* at 530 (O'Connor, J., concurring in part, concurring in the judgment); *id.* at 532 (Scalia, J., concurring in part, concurring in the judgment). In *Hodgson v. Minnesota*, 110 S. Ct. 2629 (1990), and *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990), the Court likewise employed a relaxed standard of review. These decisions marked substantial retreats from *Roe*. Overruling *Roe v. Wade* would merely—but decisively—complete the process begun in *Webster*, *Hodgson* and *Akron Center*.

Recognition that the Court is moving away from the central tenets of *Roe* is widespread. In his dissent in

[1] Whether the Court should overrule *Roe* is appropriately before the Court. While the Court "limited" its grant of review to whether the court of appeals erred in its constitutional determinations regarding the challenged provisions of the Pennsylvania statutes, 112 S. Ct. 931-32 (1992), the court of appeals' conclusions were premised on a determination that the "undue burden standard" and not *Roe*'s strict scrutiny test "is the law of the land." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 682, 698 (3d Cir. 1991).



*Webster*, Justice Blackmun stated that "[t]he simple truth is that *Roe* would not survive the plurality's analysis." 492 U.S. at 538.[2] Legal scholars concur that the Court's current abortion jurisprudence departs from *Roe v. Wade*.[3] Although Professor Dellinger urges this Court to "reaffirm" *Roe*,[4] he elsewhere concedes that "the right to have an abortion is no longer fundamental." Dellinger & Sperling, *Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. Pa. L. Rev. 83, 83 (1989).

However, eroding support on the Court for *Roe* indicates that that decision was seriously weakened even before *Webster;* the Court's decisions in *Webster*, *Hodgson*, and *Akron Center* evolved from a growing consensus on the Court that *Roe* was wrongly decided.[5] Unlike

[2] *See also, Rust v. Sullivan*, 111 S. Ct. 1759, 1786 (1991) (Blackmun, J., dissenting).

[3] *See, e.g.*, L. Tribe, *Abortion: The Clash of Absolutes* 24 (1990) ("[A]fter *Webster, Roe is not what it once was.*"); Ezzard, *State Constitutional Privacy Rights Post* Webster: *Broader Protection Against Abortion Restrictions?*, 67 Denver U. L. Rev. 401, 401 (1990) ("*Webster* sent a message to legislatures around the country that additional state restrictions on abortion are now acceptable because of the Court's new and narrow interpretation of *Roe v. Wade.*").

[4] Brief *Amicus Curiae* of Representatives Don Edwards, Patricia Schroeder, *et al.*, in Support of Petitioners at 2.

[5] The mounting opposition to *Roe* from members of the Court resulted from both later rejection of the decision by those originally counted in the majority, such as Chief Justice Burger, and the addition to the Court of new members dubious of *Roe*'s constitutional grounding. Petitioners and their *amici* disingenuously contend that overruling *Roe* would be—or, at least, would appear to be—an overtly political act. *See* Petitioner's Brief at 22 n.33; Brief *Amicus Curiae* of Representatives Don Edwards, Patricia Schroeder, *et al.*, in Support of Petitioners at 10-11, 13. This contention neglects, however, that the "goal of constitutional adjudication is surely not to remove inexorably 'political divisive' issues from the ambit of the legislative process . . . [but rather] to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not." *Webster*, 492 U.S. at 521. Furthermore, as Justice Scalia

other controversial decisions of this Court which over time gained acceptance from the original dissenters,[6] *Roe*'s ever-broadening scope and increasingly detailed legislative character produced narrowing majorities and more strongly worded dissents. As this Court noted in *Payne v. Tennessee*, 111 S. Ct. 2597 (1991), the relative strength of precedents is undermined when the rulings were issued "over spirited dissents challenging the basic underpinnings of those decisions [and when] [t]hey have been questioned by members of the Court in later decisions, and have defied consistent application by the lower federal courts." *Payne*, 111 S. Ct. at 2611.

At the outset, *Roe* and *Doe v. Bolton*, 410 U.S. 179 (1973), were condemned for appropriating the legislative function.[7] Then Associate Justice Rehnquist also criticized

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observed in *Payne v. Tennessee*, 111 S. Ct. 2597 (1991), charges that an overruling court is "exercising power not reason" have it backwards. "[W]hat would enshrine power as the governing principle of this Court is the notion that an important constitutional decision with plainly inadequate rational support *must* be left in place for the sole reason that it once attracted [a majority of the Court]." *Id.* at 2613 (Scalia, J., concurring) (emphasis in original). Moreover, the fact is that "[o]verrulings of precedent rarely occur without a change in the Court's personnel." *South Carolina v. Gathers*, 109 S. Ct. 2207, 2217 (1989) (Scalia, J., dissenting). Petitioners' argument would have precluded the overruling of *Lochner v. New York*, 198 U.S. 45 (1905), and its progeny. It was, after all, majorities largely consisting of President Roosevelt's appointees that eradicated economic due process from our constitutional jurisprudence, a result deemed correct notwithstanding the changed makeup of the Court. *See, e.g., United States v. Darby*, 312 U.S. 100 (1941) (Justice Stone, Black, Reed, Frankfurter, Douglas, and Murphy all appointed by President Roosevelt, voting to overrule *Hammer v. Dagenhart*, 247 U.S. 251 (1918)).

[6] *See, e.g., Edwards v. Arizona*, 451 U.S. 477 (1981) (per White, J.) (confession constitutionally invalid under *Miranda*); *Miranda v. Arizona*, 384 U.S. 486 (1966) (White, J., dissenting).

[7] *Roe*, 410 U.S. at 174 ("judicial legislation") (Rehnquist, J., dissenting); *Doe*, 410 U.S. at 222 ("[The majority decision is] an exercise of raw judicial power . . . This issue . . . should be left with the people and to the political processes the people have devised to govern their affairs.") (White J., dissenting).



the Court for ignoring over a century of American legal history which criminalized abortion.[8] The growing extremity of *Roe* as revealed in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), drew increasingly strong dissents from four justices.[9] Most notably in *Thornburgh*, Chief Justice Burger, who concurred in *Roe* and *Doe*, called for the reexamination of *Roe*, 476 U.S. at 785 (Burger, C.J., dissenting), and "agree[d] with much of Justice White's and Justice O'Connor's dissents," which challenged virtually every aspect of *Roe v. Wade*. *Id.* at 782.

The limited deference normally due a constitutional precedent all but evaporates where the decision has been undermined by intervening decisions calling the precedent's basic legitimacy into question. The strong criticism of the fundamental aspects of *Roe*, coming from a majority of the Court's members, has rendered the principles of *Roe* "no longer a reality" and thus ripe for overruling. *Gideon v. Wainwright*, 372 U.S. 335, 351 (1963) (Harlan, J., concurring). Whether termed a "modification" or a "dramatic retrenchment in [the Court's] jurisprudence," *Webster*, 492 U.S. at 544 (Blackmun, J., dissenting), the rejection of *Roe*'s central tenets amounts to an abandonment of the *Roe* analysis, as the court of appeals concluded below. Like so many decisions before it, *Roe* has been essentially discarded and now floats as a "derelict on the waters of the law," *Lambert v. California*, 335 U.S. 225, 232 (1957) (Frankfurter, J., dissenting), and should, therefore, be forthrightly abandoned.

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[8] 410 U.S. at 174-77 (Rehnquist, J., dissenting). *See also* Brief *Amicus Curiae* of Certain American State Legislators in Support of Respondents.

[9] *City of Akron*, 462 U.S. at 452 (O'Connor, J., joined by White, J., and Rehnquist, J., dissenting); *Thornburgh*, 476 U.S. at 782 Burger, C.J., dissenting), *id.* at 785 (White, J., joined by Rehnquist, J., dissenting), *id.* at 814 (O'Connor, J., joined by Rehnquist, J., dissenting).

## II. THE DOCTRINE OF STARE DECISIS DOES NOT PRECLUDE RECONSIDERATION OF *ROE v. WADE*.

> Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right. This is commonly true even where the error is a matter of serious concern, *provided* correction can be had by legislation. But in cases involving the Federal Constitution where correction through legislative action is practically impossible, this Court has often overruled its prior decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.

*Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-410 (1931) (Brandeis, J., dissenting). On more than 120 occasions since *Burnet*, this Court has exercised its authority to review and overrule its decisions on constitutional law.[10]

The overruling cases of the past 60 years, and most recently this Court's decision in *Payne v. Tennessee*, 111

[10] In *Burnet*, Justice Brandeis identified 28 instances in which the Court had overruled or qualified earlier decisions. An exhaustive study of this Court's decisions by Rutgers University Professor Emeritus Albert P. Blaustein and Carl Willner has yielded a total of 214 implicit and explicit overrulings to date. A. Blaustein & C. Willner, *Stare Decisis* (work in progress, 1993 publication anticipated (not released for publication)). Copies of the chart illustrating the overruling decision, the overruled precedent, the Court's rationale, and vote breakdown for each case have been lodged with the Office of the Clerk simultaneously with the filing of this Brief. *See also* Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 Wis. L. Rev. 467, 494-496 (listing 47 constitutional decisions overturned 1960-1979); Blaustein & Field, *"Overruling" Opinions in the Supreme Court*, 57 Mich. L. Rev. 151, 167, 184-194 (1958) (identifying 60 constitutional law decisions among 90 overrulings of prior Supreme Court decisions); Congressional Research Service, *The Constitution of the United States, Analysis and Interpretation*, 2115-2127, & Supp. (1987) (184 overrulings through 1986).



S. Ct. 2597 (1991), exemplify Justice Brandeis' criteria for permitting greater latitude in overruling constitutional decisions.

First is the unique difficulty of amending the Constitution to correct an erroneous decision, particularly where a legislative reformation of the error is impossible. *Payne*, 111 S. Ct. at 2610. This difficulty extends not only to the super-majoritarian requirements of Article V, but to the task of drafting an amendment that will strike the intended target without unintended effect on other constitutional provisions.[11]

Second, "precedent that conflicts with [constitutional] text is not precedent."[12] Justice Frankfurter stated, "[t]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 491-92 (Frankfurter, J., concurring.) And Justice Douglas went so far as to say that the place of stare decisis in constitutional law is "tenuous" where a prior decision conflicts with the Constitution itself.[13]

A third and related reason is that it is wrong to go on being wrong. Justice Black wrote "[a] constitutional interpretation that is wrong should not stand." *Connecticut General Co. v. Johnson*, 303 U.S. 77, 85 (Black, J., dissenting). The doctrine of stare decisis is not "an inexorable command" *Burnet*, 285 U.S. at 405, nor should it serve as "an imprisonment of reason." *Guardians Ass'n v. Civil Serv. Comm'n of New York City*, 463 U.S. 582, 618 (1983) (Marshall, J., dissenting). For

[11] Only four decisions of this Court have been overruled by amendment to the Constitution. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (11th Amendment); *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) (13th and 14th Amendments); *Pollack v. Farmers' Loan & Trust*, 157 U.S. 429 (1895) (16th Amendment); and *Oregon v. Mitchell*, 400 U.S. 112 (1970) (26th Amendment).

[12] Higginbotham, *Text and Precedent in Constitutional Adjudication*, 73 Cornell L. Rev. 411, 411 (1988).

[13] Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736 (1949).

these reasons, "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Payne*, 111 S. Ct. at 2609 (1991), *quoting Smith v. Allwright*, 321 U.S. 649, 665 (1944). Accordingly, "[i]t is . . . not only [the Court's prerogative but also [its] duty to re-examine a precedent where its reasoning is fairly called into question." *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 627-28 (1974) (Powell, J., concurring). This is particularly so where the Court's decision touches upon a concern of intense moral and political concern. Erroneous removal of such questions from the democratically controlled branches of government, and from the states, may "deaded society's sense of moral responsibility," [14] and preclude the innovation of more just and satisfactory legal solutions. This is the salutary effect, noted by Justice Brandeis, of permitting "trial and error."

*Roe v. Wade* is the type of constitutional decision for which the doctrine of stare decisis holds diminished importance. First, *Roe* is demonstrably *not* the type of decision where "correction can be had by [state] legislation." Since *Roe*, this Court has decided more than twenty cases involving municipal, state, and federal attempts to regulate abortion or abortion-related activities consistent with the dictates of *Roe;* others have been disposed of summarily; scores more have terminated in the lower federal courts, usually with decisions invalidating the challenged statute under some reading of *Roe*.

As with the present case, several of these decisions involved a state's repeated attempts to implement constitutional regulations, often invalidated because the state imprecisely divined the next expansion of the *Roe* doctrine.[15] *Roe*'s "Procrustean bed," *Webster*, 492 U.S. at

[14] J. Thayer, *John Marshall* 107 (1920).

[15] Pennsylvania: *Beal v. Doe*, 432 U.S. 438 (1977); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *Planned Parenthood v. Casey*, Cons. Nos. 91-744, 91-902 (1991); Missouri:



517, also invited constitutional challenge if a state deviated even slightly from the Court's most recent pronouncement. State attempts to establish meaningful, yet constitutional, abortion regulations were treated as "evidence of some sinister conspiracy," *Thornburgh*, 476 U.S. at 798 (White, J., dissenting), and apparently have been used as an independent basis for invalidating abortion legislation. *Planned Parenthood v. Casey*, 744 F. Supp. 1323, 1372 (E.D. Pa. 1990). In addition, although your *amici* do not concede the point, it appears that efforts to correct or ameliorate *Roe* through the Congressional powers of enforcement under the Fourteenth Amendment would likely be held to run afoul of *Roe*.[16]

Second, public opinion polls show consistent majority support for restrictions on abortions far more stringent than allowed by *Roe*.[17] But, the task of organizing public

*Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52 (1976); *Singleton v. Wulff*, 428 U.S. 106 (1976); *Poelker v. Doe*, 432 U.S. 519 (1977) (St. Louis); *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. 476 (1983); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989); *Massachusetts: Bellotti v. Baird (I)*, 428 U.S. 132 (1976); *Bellotti v. Baird (II)*, 443 U.S. 622 (1979); Illinois: *Williams v. Zbaraz*, 448 U.S. 358 (1980); *Diamond v. Charles*, 476 U.S. 54 (1986).

[16] Congressional efforts to alter the central holdings of *Roe* have been rendered exceedingly difficult by the widely held legal opinion that Congress lacks the authority to so act. *See, e.g., The Human Life Bill—S. 158: Report by the Subcomm. on Separation of Powers, Senate Comm. on the Judiciary*, 97th Cong. 1st Sess. (1981) (testimony of Robert H. Bork). *See also, Mitchell Opposes Proposed Abortion-Rights Legislation*, Wash. Post, Feb. 4, 1992, at A13, col. 1 (constitutional issues appropriately addressed through Constitutional amendment and not by a vote of Congress).

[17] In 1990, the Gallup Organization conducted the most extensive polling to date on the views of the American people on abortion. *See Americans United for Life, Abortion and Moral Beliefs, a Survey of American Opinion* (Executive Summary) (1991). Copies of the Executive Summary and the complete tabulations have been lodged with the Office of the Clerk simultaneously with the filing of this Brief. When asked under what, if any, circumstances abortion should be permitted, 74% would limit abortion to cases where the

opinion behind a constitutional amendment is greatly complicated by *Roe*'s multiple and confusing holdings.[18] The range and detail of these holdings are more characteristic of legislation than of constitutional law.[19] The resulting task of drafting a constitutional amendment that fairly meets the errors of *Roe* is daunting, if not impossible.

Third, a majority of this Court has abandoned as error central tenets of *Roe*. Unless a majority of this Court finds under renewed scrutiny that *Roe* withstands the arguments made against it and that the decisions in *Webster*, *Hodgson* and *Akron Center* wrongly

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mother's health is threatened, the pregnancy resulted from rape or incest, or there is a substantial likelihood of grave fetal deformity. *Id.* at 5. As revealed in a study conducted by the Alan Guttmacher Institute, women seeking abortions are rarely motivated by such concerns. Maternal or fetal health concerns, or the pregnancy resulting from rape or incest account for at most 7% of the 1.6 million abortions performed annually in the United States. Torres & Forrest, *Why Do Women Have Abortions?*, 20 Fam. Planning Perspectives 169 (1988). The National Opinion Research Center reports that 60 percent of those surveyed oppose the expansive abortion right created in *Roe*. *Views on Abortion Remain Divided*, N.Y. Times, Jan. 22, 1989, at 17, col. 1. Popular support for elective abortion has remained a minority position, approximately 40 percent, since 1973. *See Id.*; Blake, *The Supreme Court's Abortion Decisions and Public Opinion in the United States*, 3 Population and Dev. Rev. 45 (1977).

[18] *See* Forsythe & Grant, *Two Ships Passing in the Night: An Interpretivist Review of the White-Stevens Colloquy on* Roe v. Wade, 6 St. Louis Pub. L. Rev. 43 (1987) (identifying 12 constitutional holdings). Thus, not surprisingly, 89% of the American public fundamentally misunderstands *Roe*. Not only does this make mobilizing public opinion difficult, but it also demonstrates that polls indicating that a majority "supports *Roe v. Wade*," provide no helpful insight. Americans United for Life, Executive Summary, *supra* note 18, at 13-16.

[19] *Webster*, 492 U.S. at 518. *See also*, Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920 (1973); A. Cox, *The Role of the Supreme Court in American Government* 113-114 (1973); Epstein, *Substantive Due Process by Any Other Name*, 1973 Sup. Ct. Rev. 159; R. Bork, *The Tempting of America: The Political Seduction of the Law* 111-17 (1990).



departed from *Roe*, the Court should overrule *Roe*. This Court should not prop up an ailing decision that it is convinced incorrectly interprets the Constitution.[20] Unless independent grounds exist for rehabilitating *Roe*, stare decisis alone stands as no impediment to overruling.[21]

## III. DECLINING TO OVERRULE *ROE v. WADE* SERVES NONE OF THE INTERESTS OF STABILITY, PREDICTABILITY, OR CONSISTENCY THAT ARE FURTHERED BY THE DOCTRINE OF STARE DECISIS.

The protection of the stare decisis doctrine is limited by definition.[22] As the full title of the doctrine—*stare*

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[20] "[T]he long tradition of the Court [is] that previous decisions must be subject to re-examination when a case against their reasoning is made." Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 31 (1959). It is no violation of the doctrine of stare decisis, therefore, to consider and act upon a better-reasoned argument that the precedent in question was in error. *See also*, Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 Cornell L. Rev. 401, 408 (1988), *citing*, *Kerlin's Lessee v. Bull*, 1 U.S. (1 Dall.) 175, 178 (1786) ("[I]f a Judge conceives, that a judgment given by a former Court is erroneous, he ought not in conscience to give the like judgment, he being sworn to judge according to the law.").

[21] *Roe* has been defended by this Court almost exclusively on grounds of stare decisis. *See*, *Webster*, 492 U.S. at 458-60 (Blackmun, J., dissenting); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 420 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 779-781 (1986). This is in marked contrast to the debate occasioned by the overruling of *National League of Cities v. Usery*, 426 U.S. 833 (1976) by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). The *Garcia* dissents did not rest on stare decisis, but on the fundamental principle of federalism, and the specific dictates of the Tenth Amendment. *See id.* at 560-589. *Roe*, however, rests on no such fundamental principle, or textual mandate.

[22] Petitioners and their *amici* concede that this Court could overrule *Roe* if the Court found the decision "'unsound in principle' [or] 'unworkable in practice.'" Petitioner's Brief at 22; *see also*, Brief *Amicus Curiae* for Representatives Don Edwards, Patricia Schroeder, *et al.*, in Support of Petitioners at 17. Overruling Roe in this case is appropriate if any of these conditions is met.

*decisis et non quieta movere* ("stand by the precedents and do not disturb the calm")[23]—implies, respect for past decisions extends properly only to those doctrines that are "at rest." *Roe v. Wade*, however, is an unsettled doctrine with an unsettling effect. As the court of appeals found, this Court's decisions in *Webster* and *Hodgson* have rendered *Roe*'s central holdings no longer the law of the land, *Planned Parenthood v. Casey*, 947 F.2d 682, 698 (3rd Cir. 1991), thereby further unsettling *Roe*.[24]

1. *Roe v. Wade* ostensibly intended to settle the issue of abortion in American law.[25] However, *Roe* has proven to be inherently difficult to apply in any consistent and principled manner. *Webster*, 492 U.S. at 518-19; *City of Akron*, 462 U.S. at 459. This is highlighted by *Roe*'s progeny, which have produced a growing body of intricate, arbitrary regulations surrounding the abortion decision.[26] Far from settling the debate, these decisions

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Counsel for Petitioner's *amici* acknowledges that the *Webster* plurality has already made the requisite finding for the overruling of *Roe:* that the trimester framework is " 'unsound in principle and unworkable in practice.' " Dellinger & Sperling, *supra* at 85.

[23] Reed, *Stare Decisis and Constitutional Law*, 9 Pa. Bar A. Q. 131, 131 (April 1938).

[24] *Accord, Coe v. Melahn*, No. 90-1551 (8th Cir. Mar. 2, 1992) (WL 37328).

[25] Thus, *Roe* "promises more than it can deliver." *Payne*, 111 S. Ct. at 2618 (Souter, J., concurring). If, as Petitioners and their *amici* claim, there is a need to establish some "special justification" to overrule erroneous precedent, *id.* (Souter J., concurring), citing *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984), such justification abounds here.

[26] For example, the Court has held that a State may require that certain information be given to a woman by a physician or his assistant, *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. at 448, but that it may not require that such information be furnished to her by the physician himself. *Id.* at 449. Likewise, a State may require that abortions in the second trimester be performed in clinics, *Simopolous v. Virginia*, 462 U.S. 506 (1983), but it may not require that such abortions be performed in hospitals. *Akron, supra*, at 437-439.

*Webster*, 492 U.S. at 518 n.15.



have multiplied confusion and spawned further unanswered questions.[27]

Although the *Webster* plurality expressly repudiated *Roe*'s trimester-based analysis, earlier decisions had already departed from it where necessary to invalidate abortion regulations. Thus, in *Colautti v. Franklin*, 439 U.S. 379 (1979), the Court rejected Pennsylvania's attempt to tie fetal "viability" to *Roe*'s structure. 439 U.S. at 388-89. Similarly, in *City of Akron*, the majority ignored *Roe*'s assurance that the state interest in maternal health became compelling at "approximately the end of the first trimester," 410 U.S. at 163, invalidating a hospitalization requirement for second-trimester abortions.[28] *City of Akron*, 462 U.S. at 433-39.

Instead of seeking guidance in *Roe*'s trimester scheme, the majority in *City of Akron* looked to recently changed ACOG standards, finding that the hospitalization requirement was no longer "reasonable" because it departed from "accepted medical practice," as defined by ACOG. 462 U.S. at 436-38. With ACOG guidelines elevated to constitutional writ, Akron's ordinance was constitutional when enacted in 1978, when reviewed by the district court in 1979, and when reviewed by the court of appeals in 1981. But, it suddenly became unconstitutional in 1982 when ACOG changed its standards.

The unworkability of constitutional standards tied to ever-changing medical technology is manifest.[29] The near

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[27] Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 Geo. Wash. L. Rev. 68, 105-06 (1991) ("Whatever the merits of *Roe*, it has never stabilized; from the beginning it has been criticized by a wide spectrum of politicians and scholars, and has been the subject of constant challenges . . . . It is difficult to see much of an upside to *Roe*'s prolonged instability.")

[28] *Roe* had cited such a requirement as a regulation constitutionally advancing maternal health. 410 U.S. at 163.

[29] *See City of Akron*, 462 at 456 (O'Connor, J., dissenting).

impossibility of drafting statutes according to such a measure of constitutionality is compounded by requirements that abortion regulations accommodate the skill level of each abortion-performing physician.[30] The *Roe*-based medical technology-as-constitutional-diagnostic unacceptably places this Court in the position of acting as "an *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States." *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 99 (1976) (White, J., concurring in part, dissenting in part).

In addition to the Court departing from *Roe*'s trimester scheme for first- and second-trimester regulations, the ability of states to restrict abortions in the final trimester of pregnancy has proven illusory. According to *Roe*, in the third trimester, states could "restrict, or even prohibit abortions," unless the woman's "health" [31] would be served by an abortion, because the state's interest in protecting the life of the unborn child became "compelling" at viability. 410 U.S. at 163. However, the lower federal courts have shown a uniform hostility to virtually any attempt to limit post-viability abortions.[32] Thus, *Roe*'s promise that the states remain free to protect their compelling interest in near-term fetal life remains unfulfilled. Because *Doe v. Bolton* requires the subordination of the state's compelling interest to any factor related to the woman's emotional

[30] In *Ragsdale v. Turnock*, 841 F.2d 1358 (7th Cir. 1988), the court invalidated outpatient clinic regulations based on the testimony of highly skilled abortion providers that such regulations were not medically necessary to *their* practice of medicine.

[31] *Doe v. Bolton*, 410 U.S. 179, 192 (1973) (health includes "all factors—physical, emotional, psychological, familial, and the woman's age.").

[32] *See American College of Obstetricians and Gynecologists v. Thornburgh*, 737 F.2d 283, 299 (3rd Cir. 1984), *aff'd*, 476 U.S. 747 (1986); *Margaret S. v. Edwards*, 488 F.Supp. 181, 196 (E.D. La. 1980); *Schulte v. Douglas*, 567 F.Supp. 522 (D. Neb. 1981), *aff'd per curiam sub nom. Women's Services, P.C. v. Douglas*, 710 F.2d 465 (8th Cir. 1983).



well-being, a "balancing of interests" in the third trimester is not only unworkable but impossible.

2. Retaining *Roe* requires this Court to continue to "sit as a superlegislature to weigh the wisdom of legislation," *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963), and thus to perpetuate a case-by-case disclosure of permissible abortion regulation. Such progressive revelation forecloses the predictability that the law requires.

Although recent decisions have discarded much of *Roe*'s discredited jurisprudence, questions over the degree to which *Roe* remains hang spectre-like over every attempt to provide meaningful protection for maternal health and unborn human life. The task of dismantling *Roe* "doorjamb by doorjamb," *Webster*, 492 U.S. at 537 (Scalia, J., concurring in part, concurring in the judgment), exacerbates the instability inherent in *Roe*. Until *Roe* is expressly and wholly overruled, this Court can continue to expect *Roe*-based challenges to every abortion regulation that fails to follow to the letter the statute most recently addressed by this Court.[33]

3. The unsettled status of *Roe* is further demonstrated by the divergent analyses of the lower federal courts. Despite this Court's decisions caliing into question the basic tenets of *Roe*, most lower federal courts continue to apply in a wooden fashion an unmodified *Roe*-based analysis.[34] Only three federal decisions since *Webster*

[33] R. Bork, *supra*, note 19, at 116:

> Attempts to overturn *Roe* will continue as long as the Court adheres to it. And, just so long as the decision remains, the Court will be perceived, correctly, as political and will continue to be the target of demonstrations, marches, television advertisements, mass mailings, and the like.

*See also, Webster*, 492 U.S. at 533, 535 (Scalia, J., concurring in part, concurring in the judgment).

[34] *See*, Brief *Amicus Curiae* of William J. Guste, Louisiana Attorney General, *et al.*, in Support of Petition for *certiorari* in *Robert P. Casey, et al. v. Planned Parenthood of Southeastern Pennsylvania, et al.*, No. 91-902, at 9 n.8.

admit of any modification of *Roe*.[35] This continued reliance on *Roe* works yet another distortion in federal abortion jurisprudence—a distortion *Webster* was intended, but proved unable, to correct. A clear repudiation of *Roe v. Wade* is therefore necessary to bring the lower federal courts into compliance with this Court's standards.

4. Further indication that a doctrine is not "settled" is its effect on legal principles of more general application. In this regard, *Roe* has proven the judicial equivalent of a runaway freight train. As Justice O'Connor has observed, the Court's abortion decisions "have[] worked a major distortion in the Court's constitutional jurisprudence," such that "[n]o legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion arises in a case involving state regulation of abortion."[36] *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting). Because *Roe* arrived on the legal landscape full-grown but without parentage and with no guidance as to the generalizability of its rules, courts have applied it indiscriminately in entirely unrelated areas of the law, often disturbing well-settled principles and preventing the law's natural evolution.[37]

5. Political activity, scholarly analysis, and public opinion also reject the hypothesis that *Roe* is settled law. In the first thirteen years after *Roe* was decided, nearly

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[35] *Planned Parenthood v. Casey*, 947 F.2d 682 (3d Cir. 1991); *Planned Parenthood v. Minnesota*, 910 F.2d 479 (8th Cir. 1990); *Coe v. Melahn*, No. 90-1552 (8th Cir. Mar. 2, 1992 (WL 27328).

[36] In *Thornburgh*, the dissenters identify the Court's abandonment of constitutional doctrine in the following areas: plenary review of preliminary injunctions and standards of appellate review, 476 U.S. at 815-25 (O'Connor, J., dissenting); abstention, *id.* at 830-31; informed consent, *id.* at 798-802 (White, J., dissenting); state regulation of the professions, *id.* at 802-04; statutory construction, *id.* at 810-12. *See generally*, D. Horan, E. Grant & P. Cunningham, eds., *Abortion and the Constitution* 245, 253-255 (1987).

[37] *See* Brief *Amicus Curiae* of National Right to Life, Inc. in support of Respondents.



600 separately numbered resolutions relating to abortion have been introduced into Congress.[38] Of these, 270 were joint resolutions seeking Constitutional amendments that would overturn *Roe*.[39] Congress has also acted broadly, and successfully, to remove direct federal financial support for abortion.[40] Moreover, a 1988 Presidential proclamation declared the unborn to be protected under the Constitution, and directed the executive branch to carry out actions and programs consistent with that declaration.[41]

The strongest evidence of a popular rejection of the abortion right created in *Roe* is seen in the vast number of state legislative actions and public referenda designed to limit or regulate the performance of abortions. During the 1988 elections, a public referendum in Arkansas granted rights to the unborn under the state constitution; Michigan voters eliminated public funding for abortion; and voters in Colorado rejected an attempt to repeal an amendment to their state constitution, prohibiting virtually all public funding of abortions.[42] During the years since *Roe*, state legislatures from all regions have enacted hundreds of laws regulating abortion.[43] In addition, at least 23 state legislatures have sent memorials requesting Congress to propose an anti-abortion amendment to the Constitution, and at least 19 state

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[38] Wardle, *Rethinking* Roe v. Wade, 185 B.Y.U. L. Rev. 231, 247, *citing*, Legal Ramifications of the Human Life Amendment: Hearings before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary on S.J. Res. 3, 98th Cong. 1st Sess. 47, 73-74, App. B (1983) (prepared statement of Lynn D. Wardle).

[39] *See*, Wardle, *supra* note 38 at 247-248, n. 86.

[40] *Harris v. McRae*, 448 U.S. 297 (1980). See also, 42 U.S.C.S. Sec. 1396 *et seq.* (1985 ed. and 1990 Supp.); Wardle, *"Time Enough"*: Webster v. Reproductive Health Services *and the Prudent Pace of Justice*, 41 Fla. L. Rev. 881, 981 (1989).

[41] Proclamation No. 5761, 53 Fed. Reg. 1464 (1988).

[42] Wash. Post, Nov. 13, 1988, at C6, col. 1.

[43] Wardle, *supra* note 40 at 958-980 (comprehensive listing by state of abortion regulations); Wardle, *supra* note 38, at 247, n. 83.

legislatures have passed petitions to convene a constitutional convention to propose a human life amendment to the Constitution.[44] This strong public interest is further borne out in the accelerated legislative activity after *Webster*. More than 1000 pieces of abortion-related legislation have been introduced since 1989, the overwhelming majority seeking to establish greater protection for unborn human life. Several of these measures have been enacted.[45] The democratic branches of government, therefore, have not accepted or endorsed *Roe*.

In academic circles, few, if any, opinions of this Court have attracted *Roe*'s barrage of criticism.

> Rarely does the Supreme Court invite critical outrage as it did in *Roe* by offering so little explanation for a decision that requires so much. The stark inadequacy of the Court's attempt to justify its conclusions . . . suggests to some scholars that the Court, finding no justification at all in the Constitution, unabashedly usurped the legislative function. . . . Even some who approve of *Roe*'s form of judicial review concede that the opinion itself is inscrutable.[46]

Nor has *Roe* exhausted its critics; the stream of published criticism continues from supporters and opponents of legalized abortion.[47] *Roe* was inherently flawed from the outset;[48] its errors have compounded themselves. Most importantly, this Court's recent abortion decisions

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[44] Wardle, *supra* note 38 at 247.

[45] *See* Wardle, *supra* note 40 at 958-980; Ezzard, *supra* note 3, at 401-02 nn. 6, 7.

[46] Morgan, Roe v. Wade *and the Lessons of Pre-*Roe *Case Law*, 77 Mich. L. Rev. 1724, 1724 (1979) (footnotes omitted).

[47] Gerhardt, *supra* note 27 at 105 n. 155 (citing "critics on the right include" R. Bork, *supra* note 19 at 111-17; McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 Yale L.J. 1501, 1539-41 (1989); and "critics on the left include" M. Perry, *Mortality, Politics and Law* 172-78 (1988); A. Cox, *supra* note 19 at 113-14; Ely, *supra* note 19.

[48] Ely, *supra* note 19, at 932, 935-936.



depart from *Roe*'s central holdings. *Roe* should, therefore, be expressly overruled.

## IV. OVERRULING *ROE v. WADE* IS CONSISTENT WITH PRIOR OVERRULINGS OF CONSTITUTIONAL DECISIONS BY THIS COURT.

*Roe* not only exemplifies the type of constitutional decision for which stare decisis has limited application, it also fits the criteria previously established by this Court for a decision whose overruling is either justified or necessary.[49] Furthermore, overruling the specific doctrines of *Roe* is completely consonant with this Court's history of overturning constitutional decisions involving: (1) substantive due process; (2) individual rights; and (3) federalism. The Court has repeatedly addressed the questions posed by overruling *Roe*; such considerations have not prevented this Court from abandoning its perceived errors.

1. *Roe v. Wade* is the modern archetype of substantive due process.[50] Its predecessors, likewise founded on the Fourteenth Amendment's protections of "liberty" and "due process," have generated numerous overruling decisions by this Court. The rationale of these latter decisions applies squarely to *Roe*.

> [The Constitution] speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which

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[49] Blaustein & Field, *supra* 57 Mich L. Rev. at 168-177.

[50] Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement? Or: Privacy, You've Come a Long Way, Baby*, 23 Kan. L. Rev. 1, 4-6 (1974); *Epstein, supra* note 19.

> is reasonable in relation to its subject and is adopted in the interests of the community is due process.

*West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937), *overruling*, *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923). The determination of those evils which require restraint is, in the absence of a clear constitutional mandate to the contrary, the province of the legislature. "The courts are incompetent to judge the wisdom of state legislatures and may only preempt such wisdom where an act . . . violates an express provision of the Constitution." *Id.* at 398.

Echoing this holding, this Court in *North Dakota Pharmacy Board v. Snyder's Drug Stores*, 414 U.S. 156 (1973), rejected a due process argument against a state law restricting the ownership of drug stores to licensed pharmacists or their corporations. The Fourteenth Amendment "does not make it a condition of preventive legislation that it should work a perfect cure. It is enough that the questioned act has a manifest tendency to cure or at least to make the evil less. [T]wo opposed views of public policy are considerations for the legislative choice." *Id.* at 147, *overruling Liggett Co. v. Baldridge*, 278 U.S. 105 (1929). *See also, Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536-37 (1949).

That such cases concerned an improper expansion of Fourteenth Amendment "liberty" in the economic sphere makes them no less applicable to this case.[51] The point of these decisions is that "liberty" and "due process" cannot be employed to graft onto the Constitution a particular

[51] Moreover, this Court's overruling precedents as overbroad interpretations of Fourteenth Amendment rights is not limited to economic rights. In *Daniels v. Williams*, 474 U.S. 327 (1986), *overruling*, *Parratt v. Taylor*, 451 U.S. 527 (1981), this Court overruled a decision that held that the Fourteenth Amendment provides no basis for a statutory civil rights action alleging negligence on the part of prison officials. "Whatever other provisions of state law or general jurisprudence he may rightly invoke, the Fourteenth Amendment . . . does not afford [plaintiff] a remedy." *Id.* at 336.



view of wise public policy on subjects where the Constitution is otherwise silent. "To do so would be to indulge in the dangerous assumption that the Fourteenth Amendment was intended to give us carte blanche to embody our *economic or moral beliefs* in its prohibitions." *State Tax Comm'n v. Aldrich*, 316 U.S. 174, 181 (1942) (emphasis supplied), *overruling*, *First Nat'l Bank v. Maine*, 284 U.S. 312 (1932).

The extensive reliance placed on the "fundamental" [52] status of abortion under the Constitution as a bar to overruling *Roe* is misplaced. The "implied fundamental right to contract" [53] recognized in *Lochner* and its progeny is no less "fundamental" than the putative right to abort. If anything, the economic due process cases warranted greater protection from overruling than *Roe*'s free-floating penumbral abortion right because "considerations in favor of stare decisis are at their acme in cases involving property and contract rights." *Payne*, 111 S. Ct. at 2610.

Petitioners and their *amici* offer this Court no constitutionally sound basis for distinguishing between the Court's appropriate repudiation of economic due process and the purported inviolability of *Roe v. Wade*. Arguments that *Roe*'s exercise of substantive due process is different because *Roe* involves reproductive freedom is virtually indistinguishable from the value-based defenses of "laissez-faire" economics which sustained the ascendancy of *Lochner v. New York*, 198 U.S. 45 (1905), for more than a generation. And the cloaking of it in constitutional law is even more pernicious where, as in *Roe*, the countervailing interest is in life itself.[54]

[52] *Roe*'s holding that abortion is fundamentally protected is tenuous in light of current substantive due process analysis. *See Bowres v. Hardwick*, 479 U.S. 186 (1986); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

[53] Gerhardt, *supra* note 27 at 106 n.158.

[54] *See* Brief *Amicus Curiae* of Catholics United for Life, *et al.*, in support of Respondents (unborn have protectable right to life under the Fourteenth Amendment). The only international docu-

Moreover, as *Roe* itself recognized, abortion is "inherently different" from any other circumstance in which this Court has recognized privacy interests.

> The pregnant woman cannot be isolated in her privacy. . . . The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, *Skinner*, and *Pierce* and *Meyer* were respectively concerned.

410 U.S. at 159.[55] *Roe* itself effectively disposes of the claim that its retention is integral to protection for other, less controversial aspects of the Court's privacy jurisprudence. In particular, arguments that distinctions between contraception and abortion are constitutionally insignificant, and therefore arguments that *Griswold v. Connecticut*, 381 U.S. 479 (1965), cannot stand if *Roe* falls are in error.[56] Justice White's dissent in *Roe* and his repeated statements that *Griswold*—in which he concurred—"in no sense necessitates a holding that the liberty to choose abortion is 'fundamental,'" *Thornburgh*, 476 U.S. at 792 n.2, demonstrates that the two interests are different. Instead of an inseparable thread in the fabric of our constitutional law, *Roe* more closely resembles a poorly matched and tattered applique that can be easily removed without causing any harm to the integrity of the underlying constitutional material.

2. This Court's overrulings have also limited the scope of protection afforded under prior case law by certain explicit rights under the Constitution. For example, in *Payne v. Tennessee*, 111 S. Ct. 2597 (1991), the Court overruled *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989), which barred admission of "victim impact" testimony during the sentencing phase of a capital trial. To illustrate the limited role stare decisis plays in constitutional cases, in a footnote, the Court listed 33 instances in the past 20 terms in which it had overruled constitutional cases.

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ment to address the issue, the American Convention on Human Rights, provides: "Every person has the right to have his life respected by law and, in general, from the moment of conception." Org. of Amer. Treaty Series No. 36, at 1-21. Official Record, OAS/Ser.A/16. Similarly, with the exception of the former Yugoslavia, not one of the world's 180 constitutions expressly protects a right to abortion. The constitutions of five nations, Venezuela, Ireland, Ecuador, Peru, and Chile, provide explicit protection for the unborn. *See* A. Blaustein & G. Flanz, *Constitutions of the Countries of the World* 20 vols. (1971-current).

[55] *See also*, *Thornburgh*, 476 U.S. at 792 (White J., dissenting) (The decision to abort "must be recognized as *sui generis*, different in kind from the others that the Court has protected under the rubric of personal or family privacy or autonomy.").

> That the abortion decision, like the decisions protected in *Griswold*, *Eisenstadt* and *Carey*, concerns childbearing (or, more generally, family life) in no sense necessitates a holding that the liberty to choose abortion is "fundamental." That the decision involves the destruction of the fetus renders it different in kind from the decision not to conceive in the first place. This difference does not go merely to the weight of the state interest in regulating abortion; it affects as well the characterization of the liberty interest itself.

*Id.* at 792 n.2 (White, J., dissenting).

[56] These arguments evidence a fundamental insecurity over whether abortion itself is constitutionally protected. By linking abortion to less controversial aspects of privacy theory, Petitioners and their *amici* attempt to bootstrap constitutional protection for the abortion right. ("[T]here no longer exists any bright line between the fundamental right that was established in *Griswold* and the fundamental right of abortion that was established in *Roe*." *Transcript of Arguments Before High Court on Abortion Case*, *N.Y. Times*, April 27, 1989, at Y15 (Argument of Frank Susman, for Reproductive Health Services, in *Webster v. Reproductive Health Services*, No. 88-605). In like manner, in an attempt to persuade the Court to retain *Roe* as the "lesser evil," *see Thornburgh*, 476 U.S. at 797 (White, J., dissenting), Petitioners' *amici* concoct Orwellian fantasies in which women, having lost the right to "choose," would be compelled to abort desired pregnancies. For a more developed response to such arguments, *see* Brief *Amicus Curiae* of the Southern Center for Law & Ethics in Support of Respondents.

Likewise, in *United States v. Ross*, 456 U.S. 798 (1982), the Court held that its decision in *Robbins v. California*, 453 U.S. 420 (1981), excluding evidence obtained in a warrantless search despite the existence of probable cause that incriminating evidence would be found, was an overbroad interpretation of privacy rights under the Fourth Amendment. "[T]he doctrine of stare decisis does not preclude this action. Of greatest importance, we are convinced that the rule we apply in this case is faithful to the interpretation of the Fourth Amendment that the Court has followed with substantial consistency throughout our history." 456 U.S. at 824. Also, in *Illinois v. Gates*, 462 U.S. 213 (1983), the exclusionary rule was modified by replacing the rigid "two-pronged" test of *Aguilar v. Texas*, 378 U.S. 108 (1964), with a more flexible rule based upon the totality of the circumstances under which a warrant is obtained and a search conducted.

Previously esteemed fundamentally protected free speech guarantees were likewise limited in *Hudgens v. NLRB*, 424 U.S. 507 (1976), which abandoned the holding in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968), granting "public forum" status to certain forms of private property.[57]

3. The Court has also overruled decisions implicating the core constitutional value of federalism. Over vigorous dissent that its decision "emasculat[es]" the rights of the states under the Tenth Amendment, 469 U.S. at 572 (Powell, J., dissenting), the *Garcia* opinion overruled *National League of Cities*. And in *Erie Ry. Co. v. Tompkins*, 304 U.S. 64 (1938), this Court, also by a 5-4 vote, overruled the doctrine of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), regarding the existence of a body of federal common law. These two cases demonstrate

[57] *See also, Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990). Writing for the dissent, Justice Blackmun stated that the decision resulted in a "wholesale overturning of settled law concerning the Religion Clauses of our Constitution." *Id.* at 908 (Blackmun, J., dissenting).



that a bare majority of this Court will correct a decision it believes to be erroneous, even where the decision arguably implicates fundamental constitutional values. Again, any argument that *Roe* is more "fundamental" than the interests at stake in *Erie* and *Garcia* is unavailing. The federal structure of government is, in reality, the most basic assurance of individual liberty and protection from excessive governmental power. "Federalism is linked with individual liberty and with the health of the body politic," and thus, "[i]t is no less legitimate and proper for the Supreme Court to concern itself with assuring the health of federalism as it is for the Court to uphold individual liberties as such. In neither case is abdication of the Court's proper role consistent with the principles inhering in the Constitution."[58]

*Roe*'s ongoing breach of the principle of federalism should not be allowed to persist. As *Erie* and *Garcia* demonstrate, such decisions are often controversial. And controversy is certain to ensue no matter what path is taken regarding *Roe v. Wade*. However, perpetuating the erroneous and unworkable holdings of *Roe* cannot be justified for reasons of avoiding political strife. The highest traditions of this Court teach that in such circumstances, the proper resolution is faithfulness to the text and the fundamental values of the Constitution. That text, and those values, determine that *Roe*'s complete curtailment of the states' authority to protect unborn children should be overruled.

## V. THE MOST PRUDENT COURSE IN ADDRESSING THE PROBLEMS POSED BY *ROE v. WADE* IS TO OVERRULE THAT DECISION EXPRESSLY AND RETURN TO THE POLITICAL BRANCH OF GOVERNMENT ITS RIGHTFUL AUTHORITY TO REGULATE THE PRACTICE OF ABORTION.

A "wise exercise of the powers confided in this Court" dictates that where prudent, this Court withhold decision

[58] Howard, Garcia *and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 Ga. L. Rev. 789, 795, 797 (1985).

on overruling challenged precedent, provided it is possible to resolve the case before it by distinguishing or modifying that precedent. *Illinois v. Gates*, 462 U.S. 213, 224 (1983). However, "the Court's precedents are not sacrosanct, for [it] ha[s] overruled prior decisions where the necessity and propriety of doing so has been established." *Patterson v. McLean Credit Corp.*, 491 U.S. 164, 172 (1989). Accordingly, the traditions of this Court require that where constitutional error is palpable, where such error has caused legal instability and fomented social strife, correction by "gradual erosion" will not suffice. *Webster*'s incrementalist approach has exacerbated, not relieved, the tension in the law and society. More direct action to cure the error is called for. *Roe v. Wade* should be overruled.

1. One prudential reason for a gradualist approach is the citation of the challenged precedent in other cases. This argument, which presumes that outright overruling will be disruptive to the affected body of case law, is not applicable to *Roe*. Although *Roe* has been extensively cited by this Court, as well as by other federal and state courts, these citations, outside the context of abortion regulation, have been largely superfluous to the issues decided in those cases. To the extent courts have placed reliance on *Roe* in the non-abortion context, the result has usually been distorting.[59] Overruling *Roe* would remove an impediment to reasoned decisionmaking and the natural progression of the law, both of which have been severely truncated by the superimposition of *Roe*.

2. *Roe* has not been integrated into American law. And although the practice of abortion on demand is now legal, it has remained intensely controversial, and tainted. The fact that a majority of abortions are performed in free-standing clinics created primarily for that purpose, and often by physicians who specialize in that practice, suggests that abortion on demand has not been accepted, either by the medical profession or by society, for what

[59] *See* Brief *Amicus Curiae* of National Right to Life, Inc. in Support of Respondents.



it has become: a substitute for birth control,[60] which almost never relates to a woman's health.[61]

3. The reconsideration of *Roe*, therefore, does not pose the problems which caused this Court to defer reconsideration of the exclusionary rule in *Illinois v. Gates*. The exclusionary rule enjoyed a long history of acceptance by state courts before it was applied to the states through the Fourteenth Amendment in *Mapp v. Ohio*, 367 U.S. 643 (1961). Moreover, the rule is tied to an explicit provision of the Constitution, the Fourth Amendment. And it functions as a rule of evidence—the type of rule peculiarly within the competence of the Courts to pronounce upon. These factors, plus the acceptance of the rule by law enforcement officials and the criminal justice system, provided reason for deferring reconsideration of *Mapp*. None of these factors, however, applies to *Roe*, which abruptly preempted a field of law left to the common law and state statute from the outset of the nation's history. Moreover, *Roe* adopted a rule of legal tolerance for abortion far more liberal than any of the abortion "reform" laws of modern vintage. *Roe* was out of step with the legal system and public opinion when first written, and it remains so today.

4. Finally, as *Webster* demonstrates, if this Court does not speak decisively, by rejecting *Roe*, the controversy over that decision will continue, unabated. The nation will still look to this Court—as it does now—for a resolution of the problems created by *Roe v. Wade*. If the history of conflict over *Roe* has proven anything,

[60] Henshaw, *The Characteristics and Prior Contraceptive Use of U.S. Abortion Patients*, 20 Fam. Planning Perspectives 158 (1988) (more than 43% of the 1.6 million abortions performed annually were performed on women who had received at least one prior abortion).

[61] Torres & Forrest, *Why Do Women Have Abortions?*, 20 Fam. Planning Perspectives 169, 170 (1988) (93% of abortions performed primarily motivated by reasons unrelated to any maternal or fetal health concern, or because pregnancy resulted from rape or incest).

it is that this Court is ill-positioned to resolve the myriad legal, moral, medical, and social issues that are elements of the abortion debate. Yet, this Court is in a unique position to repair the damage done to this debate, by overruling *Roe v. Wade*. Until this is done, the other branches of government, including Congress, are virtually powerless to act in the protection of unborn life, and to resolve other pressing aspects of this controversy.

## CONCLUSION

By its nature, *Roe v. Wade* is a decision meriting a lowered deference under stare decisis. And because of its erroneous holdings and adverse impact upon constitutional law and society, *Roe* deserves to join the two hundred-plus constitutional decisions overruled by this Court. Your *amici* conclude with a plea that this Court act decisively in the matter of *Roe v. Wade*, and to speak definitively, rather than allow the discredited and outmoded doctrines of this decision to survive.

Respectfully submitted,

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